IN THE

Supreme Court of the United States

October Term, 1974

No. 74-167

UNITED STATES RAILWAY ASSOCIATION,

Appellant,

v.

CONNECTICUT GENERAL INSURANCE CORPORATION, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OBJECTION OF CONNECTICUT GENERAL INSURANCE CORPORATION, *ET AL.* TO MOTION OF TRUSTEES OF THE READING COMPANY FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

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Connecticut General Insurance Corporation, *et al.*, as Appellees in the within appeal, respectfully submit that the motion of the Trustees of the Reading Company for leave to file a brief *amicus curiae* be denied upon the grounds that they have failed to satisfy the requirements of Rule 42(3) of this Court. The Trustees have not demonstrated that the motion is timely and that the issues sought to be presented are of such relevancy to the disposition of the case as to warrant an order granting their motion, nor have they stated an interest in the proceedings sufficient to warrant granting of their motion. The motion of the Reading Trustees should be denied because:

1. The Reading Trustees did not move to intervene during the pendency of the matter below and now seek to enter this case at the 11th hour, after jurisdiction noted (cf. Rule 42(1)), some three and one-half months after the rendering of the opinion and Order below, nearly ten months after the filing of the within complaint, and little more than one week before oral argument in this Court;

2. The primary interest upon which the Reading Trustees base their motion is the possibility of the certification pursuant to Section 209(c) of the Regional Rail Reorganization Act of 1973 (the "Act") of a Final System Plan to the Special Court which might include properties of the Reading even though properties of Penn Central were not included. This possibility is of no relevance to the ultimate determination of the appeals now before this Court in that no responsible party, including United States Railway Association ("USRA"), the party endowed with the responsibility of formulating the Final System Plan, has proposed or even suggested that a Final System Plan which excludes Penn Central rail properties could be approved under the Act. The Reading Trustees also assert that the Court below should have deferred its determination of the constitutionality of the Act to the respective reorganization courts charged with rendering Section 207(b) decisions. This contention of the Trustees is based upon an inapposite reading of *New Haven Inclusion Cases*, 399 U.S. 392, as an appropriate analogy here; and

3. The Reading Trustees have not demonstrated how the interests they proffer will not be adequately defended by the United States of America through the Solicitor General or by USRA.

I.

The Reading Trustees' primary basis for requesting leave to file their *amicus curiae* brief is their argument that the *Connecticut General* Order was overbroad in declaring Section 304(f) null and void and unconstitutional on its face and in enjoining certification of a Final System Plan pursuant to Section 209(c). The Reading Trustees so urge because, upon their interpretation of the Order, the *Connecticut General* Court did not limit itself to the Penn Central facts but rather issued its decree so as to interfere with the inclusion of properties of the Reading Company in the Final System Plan.

The Reading Trustees' contention has no relevance to the disposition of the matter and therefore their motion should be denied. As all parties and courts involved in the litigation engendered by the Act have recognized, any hope of a successful implementation of a Final System Plan depends upon inclusion of substantial portions of the rail properties of Penn Central. As noted by Judge Friendly in his opinion for the Special Court (at p. 26): ". . . Penn Central comprises some 94 per cent of the operated rail mileage and 87 per cent of the railroad operating revenues of the roads before [the Special Court]" (footnote omitted). Without Penn Central there will be no Final System Plan and, accordingly, any reshaping of the *Connecticut General* Order to explicate such a contingency is indeed not relevant to the determinative issues at bar.

For the very same reasons, the Reading Trustees have not demonstrated why their interest has not or will not be adequately presented by Appellants. Certainly USRA has not been shown to be disabled in any way from raising and adequately presenting all issues deemed relevant and worthy of presentation to this Court, including issues affecting its ability to formulate a feasible Final System Plan. If USRA believes there is any possibility that a Final System Plan could be implemented without including Penn Central rail properties and that the *Connecticut General* Order was overbroad in scope on this point, the issue will doubtless be presented by USRA.

Finally, and with all due respect, the Reading Trustees' argument is premised on a faulty reading of the *Con-*

necticut General Order with respect to Section 304(f). As fully discussed at pages 102-108 of Appellees' Brief, the Court below took great pains to mold its Order to the precise constitutional infirmities it found. Thus, Section 304(f) was declared "null and void as violative of the Fifth Amendment of the United States Constitution *to the extent that it would require continued operation of rail services at a loss in violation of the constitutional rights* of the owners and creditors of a railroad," (emphasis added). The import of that part of the Order is that the Order has no application unless and until Section 304(f) is attempted to be applied in violation of the constitutional rights of owners and creditors of a railroad. Accordingly, the injunctive part of the *Connecticut General* Order provided that the defendants were enjoined from enforcing Section 304(f) "with respect to any abandonment, cessation or reduction in service *which has been or may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the United States Constitution.*" (emphasis added) (Joint Appendix at 82).

What this means for the Reading Company is not that the *Connecticut General* Court has unduly interfered with the Reading Trustees' supervision over the Reading estate, but that the *Connecticut General* Court issued an order clearly protective of the interests not only of Penn Central but also of each of the bankrupt railroad estates, including the Reading, in situations where important constitutional rights would otherwise be unprotected.

II.

The Reading Trustees go further and contend that the Court below should have wholly abstained from deciding the constitutional questions properly before it out of deference to the reorganization courts. It is not clear whether the decisional powers of the reorganization courts to which, as movants argue, such deference should have

been paid is thought by them to derive from Section 207(b) of the Rail Act or from residual powers under Section 77 of the Bankruptcy Act. In either event the Reading Trustees are quite wrong in their view of the authority available to the reorganization courts, and in neither situation is the decision of this Court in *New Haven Inclusion Cases*, 399 U.S. 392, supportive of their contention. Insofar as the Reading Trustees perceive a power in the reorganization courts to abort at a later date the procedures of the Rail Act, or to direct cessation of operations, they overlook the critical "notwithstanding" proviso of Section 304(f) which effectively strips those courts of subject matter jurisdiction to enter any such order. In other words, there was no court having "plenary authority to enter a decision on the merits" (Moving Brief, p. 10) to which the Court below could have deferred.

Both with respect to this ostensible source of authority for the reorganization courts and with respect to their power under Section 207(b) of the Rail Act, a review of the *New Haven Inclusion Cases* clearly shows the ineptness of the Reading Trustees' analogy, and, in fact, indicates that any such deferral by the Court below would have constituted an abuse of its jurisdictional discretion.

In *New Haven*, this Court held that although a statutory three-judge district court had jurisdiction to review a decision by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, with respect to the price to be paid to the New Haven Railroad for the sale of its properties to the merging Penn Central, it should have deferred to the New Haven reorganization court, which was required by Section 77 to make the same review of the same ICC decision. The Court's reasoning included the following, relevant here:

> 1. Each of the courts was to consider "the same pricing questions, to be determined by recourse to the same standards . . ." *Id.* at 425-26.

2. The Section 77 court had "full and complete power not only over the debtor and its property, but also over any rights that [might] be asserted against it." *Id.* at 421, quoting *Callaway* v. *Benton*, 336 U.S. 132.

3. There was no reason to suppose that the Section 77 court would have been unable to adjudicate all relevant questions and the three-judge court had nothing further to decide. *Id.* at 425, 427.

The role and power of the Section 207(b) courts, to which the Reading Trustees contend the Court below should have deferred, stand in unfavorable contrast to those of the New Haven reorganization court:

1. The issue below was the constitutionality of an act of Congress and the propriety of enjoining all or part of that act. Such powers are exercisable only by a three-judge court convened pursuant to 28 U.S.C. Section 2284. Neither the reorganization court nor the Special Court had such powers here.

2. Further, the reorganization courts were allowed to decide only whether the Act provided a fair and equitable process to the estates of railroads in reorganization. Having made such decisions, their options were prescribed by the Act. The issues to be decided, and the statutorily prescribed standard for deciding them, were not as broad as those which would obtain in a constitutional three-judge court action. The remedies available to the reorganization courts were clearly less extensive. Most significantly, Appellees' rights could not, consistent with due process, have been relegated to decision in judicial proceedings which themselves were under constitutional attack.

3. A deferral by the Court below to the reorganization court would have been an exercise of discretion cutting off full appellate rights of the parties. While the decisions of a reorganization court acting pursuant to Section 77 are appealable ultimately to this Court, the decisions of such courts acting pursuant to Section 207(b) were expressly made not so appealable.

Clearly, then, *New Haven Inclusion Cases* does not support the Reading Trustees' contention. The Court below was the only court to which Appellees could have brought their complaint without subjecting themselves to inadequate remedies and truncated judicial review. No party urged the Court below to defer to the statutorily prescribed procedures for the reasons now proffered by the Reading Trustees, and no such deferral by that Court would have been proper.

CONCLUSION

The motion of the Reading Trustees for leave to file an *amicus curiae* brief should be denied.

Respectfully submitted,

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see also

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